LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 31 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER of NASSAU COUNTY,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

GEORGE MORTON LEVY,
Counsel for Appellant,
Office & Post Office Address,
1539 Franklin Avenue,
Mineola, New York.

BLANK

PAGE

INDEX

	PAGE
Opinions Delivered in the Courts Below	2
Jurisdiction	2
The Statutes Involved	3
Questions Presented	6
Statement of the Case	7
The Questions Presented are Substantial	10
Conclusion	14

Citations

CASES:

Allied Stores of Ohio v. Bowers, 358 U. S. 522	3, 10
Department of Banking v. Pink, 317 U. S. 264	3
Hartford S.B.I. & Ins. Co. v. Harrison, 301 U. S. 458	10, 12
Hillsborough Township v. Cromwell, 326 U. S. 620, 623	11
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78	10, 11
Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 37	12
Morey v. Doud, 354 U. S. 457, 464	10, 11
Wheeling Steel Corporation v. Glander, 337 U. S. 562	3

PAGE

UNITED STATES CONSTITUTION:

Amendment XIV 2

UNITED STATES STATUTE:

28 U. S. C. § 1257(2) 3, 14

NEW YORK STATE CONSTITUTION:

Article I, Section 11 2

NEW YORK STATE STATUTES:

Laws of 1940, Chapter 254 8

Laws of 1952, Chapter 148 8

Laws of 1956, Chapter 837 4

McK. Unconsol. Laws § 7971 11

McK. Unconsol. Laws § 8006 11

McK. Unconsol. Laws § 9501 8

McK. Unconsol. Laws § 9502 ..... 3, 8

McK. Unconsol. Laws § 9521 8

McK. Unconsol. Laws § 9522 ..... 6, 8

LOCAL LAWS:

Nassau County Local Law No. 1, 1956 5

Nassau County Administrative Code § 4-2.1 5

Nassau County Administrative Code § 4-2.4 8

Nassau County Administrative Code § 4-2.7 9

APPENDIX:

Order of Remittitur of the Court of Appeals 1a

Judgment on Remittitur with Bill of Costs and Notice of Entry 4a

Opinion of the Court of Appeals 9a

Opinion of the Appellate Division 17a

IN THE

Supreme Court of the United States

October Term, 1966

No. ———

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR., as COMPTROLLER of NASSAU COUNTY,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the bases upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order of remittitur of the Court of Appeals of the State of New York, and the judgment made and entered upon said remittitur, from which this appeal is taken, and that the Supreme Court of the United States should exercise such jurisdiction in this case.

Opinions Delivered in the Courts Below

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 25 A. D. 2d 595, 267 N. Y. S. 2d 591.

The opinion of the Court of Appeals of the State of New York is reported at 18 N. Y. 2d 30, 271 N. Y. S. 2d 662.

Copies of said opinions are appended to this statement pursuant to Rule 15(1)(h) of the Rules of the Supreme Court of the United States. The opinion of the Appellate Division, Second Department, appears at page 17a of the Appendix, and the opinion of the Court of Appeals appears at page 9a of the Appendix.

Jurisdiction

This proceeding was brought by appellant in the Supreme Court of the State of New York, County of Nassau, pursuant to Article 78 of the New York Civil Practice Law and Rules, to review a determination of appellee Comptroller of Nassau County, which assessed a deficiency against appellant on account of county admission taxes. By order of the Supreme Court, Nassau County, the proceeding was transferred for disposition to the Appellate Division, Second Department.

The proceeding was brought upon the grounds, among others, that the Nassau County Local Law under which the admissions tax deficiency had been assessed (*Nassau County Local Law No. 1, 1956*), and the enabling act of the New York State Legislature which authorized the adoption of said local law (*Laws of 1956, Chapter 837*), were unconstitutional and void in that said enactments denied to the appellant the equal protection of the laws, in violation of Amendment XIV of the Constitution of the United States, and Article I, Section 11 of the Constitution of the State of New York.

This appeal is taken from the order of remittitur of the Court of Appeals of the State of New York, and from the judgment on remittitur of the Supreme Court, Nassau County (*Department of Banking* v. *Pink,* 317 U. S. 264). The order of remittitur was made and entered on June 9, 1966. The judgment on remittitur was made and entered on July 6, 1966. Notice of appeal was filed on September 2, 1966 with the Clerk of the Supreme Court, Nassau County, the same being the Court possessed of the record.

The Supreme Court of the United States has jurisdiction to review by appeal the said order of remittitur and judgment on remittitur by the provisions of 28 U. S. C. § 1257 (2).

The following decisions of the Supreme Court of the United States, on appeal, in which the Court reviewed the issue of repugnancy of State taxes to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, are believed to sustain the jurisdiction of the Supreme Court to review on appeal the order of remittitur and judgment on remittitur herein: *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522; and *Wheeling Steel Corporation* v. *Glander,* 337 U. S. 562.

The Statutes Involved

This appeal involves the validity of an enabling act of the Legislature of the State of New York, which authorized certain counties within the State to adopt local laws increasing the rate of the local tax on admissions to certain pari-mutuel harness horse race meetings, and of a local law adopted by Nassau County pursuant to such enabling act. The enabling act is Chapter 837, Section 3, of the Laws of 1956. The statute as amended is set forth in Book 65, Part 3 of McKinney's Consolidated Laws of New York Annotated, at page 499; and is cited as McK. Unconsol. laws § 9502. Its text follows:

CHAPTER 837

An Act to amend the pari-mutuel revenue law, in relation to capital improvements to harness race tracks and to the granting of licenses in connection therewith; and to amend chapter one hundred forty-eight of the laws of nineteen hundred fifty-two, entitled "An act to enable certain counties and cities to impose a tax on admissions to harness horse race meetings and providing for the collection and administration of such tax," in relation to increasing the amount of such tax.

Became a law April 19, 1956, with the approval of the Governor.

Effective April 19, 1956.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

• • •

§ 3. Section two of chapter one hundred forty-eight of the laws of nineteen hundred fifty-two, entitled "An act to enable certain counties and cities to impose a tax on admissions to harness horse race meetings and providing for the collection and administration of such tax," as last amended by chapter two hundred eighty-seven of the laws of nineteen hundred fifty-four, is hereby amended to read as follows:

§ 2. In cities or counties adjacent to a city having a population in excess of two million, any local law adopted pursuant to section one of this act shall require every corporation, association or person holding a harness horse race meeting within the area to which such law is applicable, to collect in addition to the admission price of tickets sold or otherwise disposed of to patrons for admission, for each such meeting held by such corporation, association or persons, a tax not in excess of thirty per centum of such admission price. In all other cities or counties, any local law adopted pursuant to section one of this

act shall require every corporation, association or person holding a harness horse race meeting within the area to which such law is applicable, to collect in addition to the admission price of tickets sold or otherwise disposed of to patrons for admission, for each such meeting held by such corporation, association or person, a tax not in excess of fifteen per centum of such admission price. In case of failure to collect such tax the same shall be imposed upon the corporation, association or person holding such meeting. Such tax shall be paid to the county or city within ten days after the close of each such meeting. The amount so collected shall be deposited in the general fund of the county or city and, unless restricted by local law to a specified purpose or purposes, shall be available for any lawful county or city purpose.

The local law is Nassau County Local Law No. 1, 1956, which amends § 4-2.1 of the Nassau County Administrative Code by increasing the rate of the County admissions tax imposed thereby. Its text follows:

LOCAL LAW NO. 1, 1956

A Local Law to amend the Nassau County administrative code, in relation to harness horse race admissions taxes

(Became a law April 16, 1956 with the approval of the County Executive. Passed by the Board of Supervisors of the County of Nassau.)

Be it Enacted by the Board of Supervisors of the County of Nassau, as follows:

Section 1. Section 4-2.1 of the Nassau County administrative code, as last amended by local law number one of nineteen hundred fifty-four, is hereby amended to read as follows:

§ 4-2.1 Imposition of tax. A tax is hereby imposed on all admissions to harness horse race meetings conducted at race meeting grounds or enclosures located within the county of Nassau at the rate of thirty per centum of the admissions price. The racing

association or corporation conducting a harness horse race meeting shall, in addition to the admissions price, collect such tax on all tickets sold or otherwise disposed of to patrons for admission with the sole exception of those issued free passes, cards or badges in accordance with the specific authority of the laws of the State of New York. In case of failure to collect such tax the tax shall be imposed on the racing corporation or association conducting such meeting.

§ 2. This local law shall take effect immediately, provided the governor shall have approved the bill authorizing a thirty per centum tax. If said bill shall not have been approved on or before the day the county executive approves this local law, then this local law shall take effect on the day the governor approves said bill.

Questions Presented

The enabling act authorized the increase of local admissions taxes to pari-mutuel harness horse race meetings from a statutory maximum of 15% to a statutory maximum of 30%. The only State subdivisions which were authorized to increase the admissions tax rate are cities and counties adjacent to a city having a population in excess of two million.

No increase in the 15% local tax rate was authorized with respect to admissions to running horse race meetings, as distinguished from harness horse race meetings. The local admisions tax to running horse race meetings everywhere in the State remains limited by State statute to 15%. McK. Unconsol. L. § 9522.

The only city in the State with a population in excess of two million is New York City; the only *city* adjacent to New York City which contains a harness race track is Yonkers, New York, in which Yonkers Raceway is located; and the only *county* adjacent to New York City which contains a harness race track is Nassau County, in which

appellant conducts Roosevelt Raceway. The local admissions tax increase to 30% is therefore, by the terms of the enabling act, limited in application to two particular enterprises, Roosevelt Raceway and Yonkers Raceway. The local admission tax to the running horse race tracks located in New York City and its environs (Aqueduct and Belmont) remains limited by State law to 15%.

The principal question presented is whether the above enabling act, and the local law adopted pursuant thereto, are unconstitutional because they deny to appellant the equal protection of the laws. The subsidiary questions fairly comprised therein include the following:

(1) Whether the enabling act, considered in conjunction with State legislation applicable to running race meetings, is unconstitutional because it discriminates without any conceivable rational justification between those race tracks that conduct harness horse race meetings and those that conduct running horse race meetings.

(2) Whether the enabling act is unconstitutional because it discriminates among harness race tracks on the basis of whether the city or county in which the harness race track is located is adjacent to the City of New York.

(3) Whether the enabling act is unconstitutional because it is so drawn as to limit the class subject to the increased tax rate to two particular enterprises.

Statement of the Case

Appellant is a corporation organized under the Pari-Mutuel Revenue Law of the State of New York. It is licensed to conduct harness race meetings with pari-mutuel betting, and has conducted such meetings at Roosevelt Raceway in Nassau County since 1940, the year in which

the New York Legislature legalized pari-mutuel betting on horse races by adopting the Pari-Mutuel Revenue Act (Laws of 1940, Chapter 254). The original enactment prohibited any county or municipality from imposing any admissions taxes on pari-mutuel tracks.

In 1952, the Legislature for the first time authorized counties and cities to impose a tax on admissions to horse race meetings conducted in such counties or cities (L. 1952, c. 148; McK. Unconsol. L. §§ 9501, 9521). The maximum tax rate was fixed at 15% for harness tracks and running tracks alike, throughout the State (McK. Unconsol. L. §§ 9502, 9522).

In 1956, the above enabling act was adopted, authorizing an increase of admission taxes to 30% only for harness race tracks located in a city or county adjacent to a city having a population of over two million. Nassau County increased the admission tax payable by appellant to the new maximum rate of 30% by adoption of Local Law No. 1, 1956, to take effect immediately upon the Governor's approval of the enabling act.

In 1964, appellant filed its tax return for the period from July 30, 1964 to September 28, 1964, showing an unpaid balance of $8,695.46, and claiming that the Nassau County admission tax is unconstitutional, illegal and discriminatory. In the tax return, appellant stated that all admission tax payments in 1964 had been made under protest, and that appellant proposed to test the validity of the admission tax in a court of competent jurisdiction.

The Nassau County Comptroller made his written determination dated October 15, 1964, of an admissions tax deficiency in the said amount of $8,695.46. In conformity with Nassau County Administrative Code § 4-2.4, appellant, within 30 days thereafter, filed its protest against the deficiency determination, and, at appellant's request, hearings were held before the Comptroller on December 1 and December 16, 1964 with respect to the validity of the tax. The

Comptroller made his written determination dated December 30, 1964 disclaiming jurisdiction to pass upon the constitutionality of the tax and rejecting the protest. As required by Nassau County Administrative Code § 4-2.7, appellant instituted this proceeding to review the Comptroller's determination within 90 days thereafter. Appellant's petition to the Supreme Court, Nassau County asserts in Paragraph 25 the repugnance of the admission tax to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and prays for judgment declaring the local law in contravention of the Fourteenth Amendment.

After joinder of issue, the matter was transferred to the Appellate Division, Second Department for determination. The matter was determined upon the pleadings, including the transcript of the hearing before the Comptroller annexd as an exhibit to the petition. The federal constitutional question was further presented to the Appellate Division in briefs and oral argument and the Appellate Division, by order dated February 14, 1966, annulled the Comptroller's determination and granted the petition, on the ground that the enabling act and the local law deprived appellant of the equal protection of the laws, three justices concurring and two dissenting.

Appellees appealed to the Court of Appeals, wherein the federal constitutional question of repugnance to the equal protection clause, in addition to non-federal grounds, were presented to the Court by the record on appeal, and the briefs and oral arguments of counsel. The Court of Appeals, five judges concurring and two dissenting, reversed the order of the Appellate Division, holding, with respect to the federal constitutional question, that the enabling act and the local law were not repugnant to the equal protection clause. Appellant thereafter moved for an amendment of the remittitur of the Court of Appeals to state the federal constitutional question passed upon by the

Court. The Court of Appeals denied the motion (N. Y. Law Journal, September 27, 1966) as unnecessary since the federal constitutional question is discussed and passed upon in the Court's opinion.

The Questions Presented are Substantial

The decision below has sustained the validity of a tax statute which, in purpose and effect, singles out two harness tracks, Roosevelt Raceway and Yonkers Raceway, for unique and doubly onerous tax liability, as compared with running tracks engaged in substantially the same business in the same metropolitan area. If the enabling act had designated Roosevelt Raceway and Yonkers Raceway by name as the sole entities to which the higher tax rate could be applied, it could not be seriously disputed that their constitutional right to the equal protection of the laws had been denied to them. (*Morey* v. *Doud,* 354 U. S. 547.) In this case the enabling act, instead of naming these tracks explicitly, defines the class to be subjected to the increased tax in such a way that it applies, and can only apply, to these two particular enterprises, although two other running tracks are similarly situated. The federal question presented by this appeal, therefore, involves the extent to which the equal protection clause protects individual enterprises against tax legislation which singles them out for added tax liability.

The constitutional limitations upon the classification power of the states have been frequently considered by the Supreme Court of the United States (*e.g., Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Hartford S.B.I. & Ins. Co.* v. *Harrison,* 301 U. S. 458; *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522) and the applicable principles are well settled. The State's discretion in classification is broad, particularly in taxation, and will be sustained unless there is no reasonable basis for the classification adopted. If any state of facts reasonably can be con-

ceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed. (*Lindsley* v. *Natural Carbonic Gas Co., supra,* at p. 78.)

Applying these tests, a majority of the Appellate Division below concluded that there was no rational basis for the classification employed in the enabling act, and a majority of the Court of Appeals concluded that there may have been such reasonable basis.

This case, however, differs significantly from other cases that have come before the Supreme Court of the United States in which tax classifications have been sustained. Here, the membership in the class being regulated by the State is itself extremely small (the number of pari-mutuel harness tracks is limited by State law to eight, under McK. Unconsol. L. § 8006, and the number of pari-mutuel running tracks is limited to nine under McK. Unconsol. L. § 7971). Accordingly, the exercise of the power to sub-classify within this group is likely to confine the impact of the legislation to a single member or as in this case, two members. While this fact does not, in and of itself, take from the State the power to classify in the adoption of police and tax laws, it emphasizes the pertinence of the "caution" added to the traditional rules by this Court in *Morey* v. *Doud,* 354 U. S. 457 at page 464, that " 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' "

The federal question is thus particularly substantial in this case where the adoption of an apparently arbitrary distinction lends itself to the selection of individual members of a small class as objects of discriminatory legislation. *Hillsborough Township* v. *Cromwell,* 326 U. S. 620, 623.

In this case, the classification in the enabling act distinguished between racetracks conducting harness races and those conducting running races. The difference between the two kinds of horse races clearly has no relevance to tax rates (e.g., the position of the jockey astride the horse compared with that of a driver in a sulky; the different gait of the horse; or the general practice of conducting harness races at night and running races in the daytime). This Court has repeatedly held that the mere existence of differences is not sufficient to sustain the classification—the discrimination must have some reasonable relation to these differences. (*Hartford S.B.I. & Ins. Co.* v. *Harrison*, 301 U. S. 458, 463; *Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 37). Here, as the record indicates (p. 19a), the two kinds of racing are part of a single sport, and compete with each other for the same public patronage.

We submit that no rational justification for the discriminatory tax herein imposed has been or can be suggested. When the question was presented at the hearing before the Comptroller of Nassau County, the presiding Supervisor of the Board of Supervisors frankly said that "I don't know how you can make distinctions between a horse that runs with . . . a sulky and a horse that runs without it."

In the Appellate Division, the Court held that:

> "There is no rational basis for a distinction between a tax on running tracks and one on harness tracks. They are both parts of a single sport of horse racing" (App. p. 19a).

In the Court of Appeals, Chief Judge Desmond said:

> "We do not know what prompted the legislature to permit a 30% impost on harness tracks only" (App. p. 15a).

The Court however speculated that since harness racing is "generally carried on at night and flat racing in the

daytime," the Legislature might have considered "that night operations result in greater municipal costs than those in the daytime" (App. p. 15a). There was not a scintilla of evidence to support this in the record nor are we able to hazard any guess as to the greater expense the municipality may be put to where the track runs at night rather than during the daytime. The only difference is that the nighttime operation is artificially illuminated—but the track, not the County, supplies the illumination. If anything, the State derives a greater revenue from a nighttime operation in view of the utility tax imposed upon electricity.

The Court of Appeals also conjectured that "there is little public transport" in Nassau and Westchester County so that the Legislature might have considered that these tracks "require expenditure by the localities of larger amounts for highways" (App. p. 15a). Again, there was no evidence of this in the Record. If common knowledge is the basis of the Court's reasoning, it is well known that the major highways which criss-cross Westchester and Nassau Counties and service the metropolitan tracks were built by federal and state funds and are part of an interstate highway system. We do not understand that any county contributions were made to any of these highways.

If, as the Court of Appeals suggested, the reason for the discrimination is "that the two harness tracks which could be affected by these two increased admissions taxes are in the heavily populated metropolitan area" (App. p. 15a) what reason is there to justify a lower tax on running tracks which are even more centrally located in the same heavily populated metropolitan area?

The Court of Appeals also called attention to the fact that running tracks and harness tracks are regulated by different commissions; that the pari-mutuel tax rate is computed under a different formula; and that legislation

dealing with the modernization of running tracks and harness tracks involved the use of different formulae (App. pp. 12a-13a). Certainly, the existence of different administrative agencies does not warrant a double tax on harness tracks; the distinction in pari-mutuel formula is no difference at all since application of the formula results in substantially the same tax on both the flat and harness tracks and the difference in the modernization formulae actually redounded to the financial benefit of the running tracks, as compared with the harness tracks—a distinction in favor of running tracks certainly would not warrant an increased admissions tax burden on harness tracks as compared with running tracks.

In conclusion, Chief Judge Desmond said:

> "We will never know what in fact moved the Legislature. . . ."

We submit that there is nothing which can be suggested or imagined which could conceivably justify a 30% tax on harness tracks located in Nassau and Westchester Counties as compared with the 15% tax on a running track located partially in Nassau County and the City of New York and another running track located entirely in New York City.

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code.

Respectfully submitted,

GEORGE MORTON LEVY,
Counsel for Appellant.

APPENDIX

Order of Remittitur of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS:

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

2. No. 133. 66

In the Matter

of

the Application of ROOSEVELT RACEWAY, INC.,
Respondent,

For a review &c.

VS.

COUNTY OF NASSAU & ANO., &C.,
Appellants.

BE IT REMEMBERED, That on the 15th day of March in the year of our Lord one thousand nine hundred and sixty-six, County of Nassau & ano., &c., the appellants in this

cause, came here unto the Court of Appeals, by Morris H. Schneider, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Roosevelt Raceway, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by George Morton Levy, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Seymour S. Ross, of counsel for the appellants, and by Mr. George Morton Levy, of counsel for the respondent, and by Mr. Joel Lewittes, of counsel for the Attorney General, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs in this Court and in the Appellate Division, and the matter remitted to the Comptroller of Nassau County for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now

Order of Remittitur of the Court of Appeals

remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE, } ss.:
Albany, June 9, 1966. }

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Judgment on Remittitur with Bill of Costs and Notice of Entry

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

In the Matter

of

The Application of ROOSEVELT RACEWAY, INC.,
Petitioner,

For a review under Article 78 of the determination of the County Comptroller and for a judgment or decree declaring unconstitutional and null and void Local Law I-1956 imposing a 30% admissions tax on harness horse race meets, and related relief

against

COUNTY OF NASSAU and PETER P. ROCCHIO, SR. AS COMPTROLLER OF NASSAU COUNTY,
Respondents.

The above named respondents, County of Nassau and Peter P. Rocchio, Sr., as Comptroller of Nassau County, having appealed to the Court of Appeals from the Order of the Appellate Division, Second Department, entered in the Office of the Clerk of said Appellate Division the 14th day of February, 1966, (1) annulling the determination of respondent, Comptroller of Nassau County, made December 30, 1964, assessing a deficiency against petitioner on account of County admissions taxes, and (2) granting judgment that Chapter 837 of the Laws of 1956 of Nassau County Local Law No. 1 of 1956 are unconstitutional and void, and the said appeal having come on to be heard before the Court

Judgment on Remittitur with Bill of Costs and Notice of Entry

of Appeals, and the Court of Appeals having duly made an order reversing the aforesaid order of the Appellate Division, with costs in the Court of Appeals and in the Appellate Division, and remitting the matter to the Comptroller of Nassau County for further proceedings in accordance with the opinion of the Court of Appeals, a copy of which order and Record on Appeal in the Court of Appeals was remitted and filed in the Office of the Clerk of the County of Nassau on the 17th day of June, 1966, and the Comptroller of Nassau County, in accordance with the order and opinion of the Court of Appeals, having duly assessed a tax deficiency of $8,695.46 against petitioner on account of unpaid County Admissions taxes, plus penalty of $434.77 and interest of $1,739.00, totaling $10,869.23, and the costs and disbursements of the respondents having been duly taxed in the sum of $1,086.20.

Now, on the motion of Morris H. Schneider, Exec. Bldg., Mineola, N. Y., attorney for the respondents, County of Nassau and Peter P. Rocchio, Sr., as Comptroller of Nassau County, it is

ADJUDGED, that the order of the Appellate Division, Second Department, entered on the 14th day of February, 1966, be and the same hereby is in all respects reversed, and it is further

ADJUDGED, that the respondent, County of Nassau, and Peter P. Rocchio, Sr., as Comptroller of Nassau Co., Mineola, New York, recover of petitioner, Roosevelt Raceway, Inc., Westbury, New York, the sum of $10,869.23, plus statutory interest, pursuant to section 4-2.11 of the Nassau County Administrative Code, accruing after July 8, 1966, together with the sum of $1,286.80, costs and disbursements as taxed, making in all the sum of $12,155.43, and the respondents have execution therefor.

Judgment signed and entered this 6th day of July, 1966.

FRANKLIN H. ORNSTEIN,
Clerk.

Costs and Disbursements

(BILL OF COSTS)

SUPREME COURT

COUNTY OF NASSAU

Index No. 3101-1965

In the Matter

of the

Application of ROOSEVELT RACEWAY, INC.,

Petitioner,

against

COUNTY OF NASSAU, *et al.*,

Respondents.

Costs

Appeal to App. Div. or App. Term before argument CPLR § 8203 subd. 1	$25.00
Appeal to App. Div. or App. Term for argument... CPLR § 8203 subd. 2	50.00
Appeal to Court of Appeals before argument..... CPLR § 8204 subd. 1	50.00
Appeal to Court of Appeals for argument..... CPLR § 8204 subd. 2	75.00
COSTS	$200.00
DISBURSEMENTS	1086.20
TOTAL	$1286.20

Costs and Disbursements

Disbursements

Paid printing cases—Court of Appeals CPLR § 8301(a)6	$390.00
Paid Printing Brief—Court of Appeals	501.20
Paid Printing Brief—Appellate Division	195.00
TOTAL	$1086.20

(ATTORNEY'S AFFIRMATION)

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that he is a Deputy County Attorney in the office of Morris H. Schneider, County Attorney of Nassau Co. the attorney of record for the Respondents in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses, attended as such witness on the trial, hearing or examination before trial herein the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names, from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from the same place of trial, hearing or examination; and that copies of documents or papers as charged herein were actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: June 23, 1966.

WILLIAM D. SIEGEL.

Costs—Adjusted at $1286.20 this 6th day of July 1966.

FRANKLIN H. ORNSTEIN,
Clerk, Nassau Co.

Costs and Disbursements

(NOTICE OF ENTRY)

Sirs:

PLEASE TAKE NOTICE that the within are true copies of a judgment on remittitur entered in the Office of the Clerk of the County of Nassau on the 6th day of July, 1966, and the items of costs and disbursements in the within action as taxed, pursuant to sections 8204 and 8403 of the CPLR, by the Clerk of the County of Nassau, at his office, in Mineola, New York on the 6th day of July, 1966 and the amount inserted in the Judgment Roll.

Dated: Mineola, New York,
July 6th, 1966.

Yours, etc.,

MORRIS H. SCHNEIDER,
County Attorney of Nassau County,
Attorney for Respondents,
Office and Post Office Address,
Executive Building,
Mineola, New York.

To:

GEORGE MORTON LEVY, Esq.,
Attorney for Petitioner,
1539 Franklin Avenue,
Mineola, New York.

Opinion of the Court of Appeals

DESMOND, *Chief Judge.*

This article 78 CPLR proceeding was brought against Nassau County and its County Comptroller to challenge the validity under the Federal and State Constitutions of chapter 837 of the Laws of 1956, McK. Unconsol. Laws, §§ 8008, 8020, 9502, and Nassau County Local Law No. 1 of 1956 pursuant to which the county by authorization of the State statute imposed a 30% tax on admissions to the harness horse races held at petitioner's racetrack in Nassau County (which tax petitioner paid from 1956 until 1964). By earlier laws passed in 1952 (chs. 148, 236) and in 1954 (chs. 285, 287) McK. Unconsol. Laws, § 9501 et seq., the State gave its permission to all counties (availed of by Nassau in 1954) to levy a 15% tax on such admissions. The 1956 State law change made possible an increase from 15% to 30% of county-collected admissions taxes at harness tracks in cities or counties adjacent to a city having a population in excess of two million, that is, to New York City.

The Appellate Division by a vote of 3 to 2 held that the 1956 State statute and the Nassau County local law passed pursuant thereto were unconstitutional because of lack of a rational basis for a distinction between a tax on running tracks (as to which counties are allowed to impose a 15% admissions tax only) and harness tracks in the metropolitan area. This, said the Appellate Division majority, denied to petitioner equal protection of the laws. One of the Justices who made up the majority, while concurring in this specification of unconstitutionality, thought that the State statute had been invalidly passed since, so he reasoned, it was in effect a local law and so, under the Home Rule provisions of the State Constitution (art. IX, § 1, subd. [b], as it was in 1956), required a request therefor by the Board of Supervisors of the county or a certificate

of necessity signed by the Governor. It had neither. The two dissenting Justices, pointing to the settled rule that "In matters of taxation, the Legislature has broad powers of classification", concluded that it was not arbitrary or lacking in reason to find distinctions between the two types of horse race meetings and that there was no violation of either Constitution.

Before arriving at the prime constitutional question (equal protection) we consider several other grounds of alleged invaladity asserted by petitioner but all rejected by the Appellate Division. In the first of these petitioner says that the 1956 statutory change despite its general verbiage was actually directed at petitioner's track in Nassau County and a similar harness racing track at Yonkers in Westchester County and so was a law local in its terms or in its effect requiring under (former) article IX (§ 1, subd. [b]) of the New York State Constitution a request from the local Board of Supervisors for a certificate of necessity transmitted by the Governor to the Legislature. It is true that limiting this authorized tax increase to cities or counties adjacent to New York City reduced its coverage to these two tracks since no other harness race tracks operate in that area. But such geographical classifications are old in New York law and have consistently been upheld (People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247; Farrington v. Pinckney, 1 N. Y. 2d 74, 150 N. Y. S. 2d 585, 133 N. E. 2d 817; Matter of Four Maple Drive Realty Corp. v. Abrams, 2 A. D. 2d 753, 754, 153 N. Y. S. 2d 747, 750, app. dsmd. 2 N. Y. 2d 837, 159 N. Y. S. 2d 976, 140 N. E. 2d 870, app. dsmd. 355 U. S 14, 78 S Ct 22, 2 L Ed 2d 21; Spatt v. City of New York, 13 N. Y. 2d 618, 240 N. Y. S. 2d 605, 191 N. E. 2d 91, app. dsmd. 375 U. S. 894, 84 S. Ct. 451, 11 L. Ed. 2d 411). In 1898 in Matter of Henneberger, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132 this court said that "good reasons exist why, in a general

law, reference may be had to conditions of population, whether in counties, cities, towns or villages, or with respect to a proximity to cities of a certain growth" (pp 429-430, 50 N. E. p. 64). In 1944 in Stapleton v. Pinckney, 293 N. Y. 330, 334, 57 N. E. 2d 38, 39, 155 A. L. R. 783 we said that a statute need not be classified as local for Home Rule purposes but although it contained classifications "based upon population or upon proximity to great centres of population may be a general law though only a single municipal corporation or locality can at the time receive its benefits" (see, similarly, Robinson v County of Broome, 276 App. Div. 69, 93 N. Y. S. 2d 662 [1949], affd. 301 N. Y. 524, 93 N. E. 2d 77 [1950]). It is to be kept in mind that enactment of tax laws is a State function but that the State may "delegate to a county or city power to assess and collect taxes in different ways" (County Securities v. Seacord, 278 N. Y. 34, 37, 15 N. E. 2d 179, 180). It is important, too, as to the Home Rule point, that chapter 837 of the Laws of 1956 is permissive, not mandatory (see New York Steam Corp. v. City of New York, 268 N. Y. 137, 143, 144, 197 N. E. 172, 173, 174; 99 A. L. R. 1157).

Next, petitioner argues that the Nassau County enactment was void in that at the time of its passage Nassau County had no present authority since its local law was passed three days before the State enabling act was signed by the Governor. However, the local law itself took care of this by providing that it should take effect immediately if the Governor meanwhile should have approved the State act, but that, if the Governor should not have attached his signature to the State enactment on or before the approval of the local law, the latter should take effect on the day on which the Governor should approve the State bill. Such arrangements for a statute taking effect on the happening of some future event do not result in invalidity (see Barto v. Himrod, 8 N. Y. 483, 490).

Another argument against the validity of the admissions tax increase is that such local taxation of racetracks is not permitted under section 9 of article I of the State Constitution. That section created an exception to the constitutional prohibition of gambling and permitted parimutuel betting on horse races "as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government". Petitioner would have us read that language to mean that the county, as distinguished from the State itself, may not be authorized to collect a tax on admissions to any racetrack where there is pari-mutuel betting. However, the right of the State to tax or to permit a county to tax racetrack admissions is not based on or affected by that part of section 9 of article I. The tax with which we are here concerned is not a tax on betting but on admissions fees charged for entering the racetrack. There is a substantial difference between those two kinds of taxes.

We arrive now at the major issue, that is, as to the constitutionality of taxing admissions fees to the two kinds of racetracks at two different rates. The Appellate Division wrote that "there is no rational basis for a distinction between a tax on running tracks and one on harness tracks. They are both parts of a single sport of horse racing." The first answer to that is that the Legislature in many other statutes has ordered different treatment for "flat tracks" and "harness tracks". For instance, corporations conducting running races are subject to license and control by the State Racing Commission (L. 1926, ch. 440, as amd., § 6 et seq., McK. Unconsol. Laws, § 7907 et seq.) while harness track racing is controlled and licensed by a different commission with different powers (Pari-mutuel Revenue Law [L. 1940, ch. 254, as amd.], § 35 et seq., McK. Unconsol. Laws, § 8001 et seq.). The State's taxation of betting at running tracks is at a rate and formula different from the tax on betting at the harness tracks (compare

L. 1940, ch. 254, as amd., §§ 9 and 9-a with § 45, McK. Unconsol. Laws, §§ 7959, 7960, 8019). The fixation of the local admissions tax on these two kinds of tracks was by different statutes (see L. 1952, chs. 148, 236). The Legislature has at various times provided financial assistance to both kinds of tracks for modernization of their facilities, and this again was done under different statutes and under quite different formulae (compare, for instance, L. 1956, ch. 837, with L. 1955, ch. 813, and L. 1957, ch. 355, McK. Unconsol. Laws, §§ 7954, 7959, 7960, 7972). It is thus apparent that the Legislature, for whatever reason, has consistently and over a period of years put these two kinds of racetracks into different classifications for purposes of control and taxation.

In Matter of Keeney's Estate, 194 N. Y. 281, 286, 87 N. E. 428, 429 we said this: "The right and power of governments to single out certain classes of objects for taxation, leaving other classes exempt or taxed at a different rate, or in a different manner, is unquestionable. * * * Such power has been exercised by all governments from the earliest times." The *Keeney* opinion went on to say that the exercise of this power is subject to one condition only, that is, that the classification must not be " 'so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it.' " We put the same idea into other words in Matter of 436 West 34th St. Corp. v. McGoldrick, 288 N. Y. 346, 349, 350, 43 N. E. 2d 436, 437 when we wrote that such classifications for taxation purposes are valid unless "based on fictions or on arbitrary or unreasonable assumptions of fact" or unless they indicate "hostile or oppressive discrimination" and that "The question of constitutional validity disappears when it cannot be said that no state of facts reasonably justifying the classifications can be conceived". Still another formulation of this principle is in McGowan v. State

of Maryland, 366 U. S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 where it was written that "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." The controlling authorities which express and apply this concept are literally innumerable, including our 1964 decision (cited by the Appellate Division majority) of Ampco Print.-Advertisers' Offset Corp. v. City of New York, 14 N. Y. 2d 11, 24, 247 N. Y. S. 2d 865, 872, 197 N. E. 2d 285, app. dsmd. 379 U. S. 5, 85 S. Ct. 47, 13 L. Ed. 2d 21, where we remarked that " 'in taxation there is a broader power of classification than in other exercises of legislation.' " *Ampco* cited People ex rel. Hatch v. Reardon, 184 N. Y. 431, 445, 77 N. E. 970, 974, 8 L. R. A., N. S., 314, affd. 204 U. S. 152, 27 S. Ct. 188, 51 L Ed 415, where it was recalled that "Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and Federal courts * * * The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs" In the last paragraph of the *Ampco* opinion there is a considerable list of tax laws validated by the United States Supreme Court which upheld taxing discriminations as to the justice and reasonableness of which judgments might differ. The conclusion of the *Ampco* opinion was that such distinctions may not be considered arbitrary or violative of the equal protection clause where a state of facts reasonably can be conceived that would sustain it (see Matter of 436 West 34th St. Corp. v. McGoldrick, 288 N. Y. 346, 350, 43 N. E. 2d 436, 437, supra).

Our question then is this: is there any conceivable justification for this particular statutory classification? We

do not know what prompted the Legislature to permit a 30% impost on harness tracks only and in certain parts of the State only. But differences have been recognized by the Legislature for a long time and it is for the Legislature, not for us, to say how these differences are to be taken account of. The differences must be substantial but "need not be great" (State Board of Tax Comrs. of Indiana v. Jackson, 283 U. S. 527, 538, 51 S. Ct. 540, 75 L. Ed. 1248, and list of instances at that page; see, also, Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237, re taxing anthracite and not bituminous coal, and Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, as to taxing oleomargarine differently from butter). For instance, harness racing is generally carried on at night and flat racing in the daytime. The Legislature could have come to the conclusion that night operations result in greater municipal costs than those in the daytime. Then, too, the harness racing tracks subject to the 30% authorization are in Nassau and Westchester Counties where there is little public transport and very large attendance and these tracks might be thought to require expenditure by the localities of larger amounts for highways. It can be judicially noticed and appears from official statistics that the two harness tracks which could be affected by these two increased admissions tax are in the heavily populated metropolitan area, again justifying the conclusion that local government would be put to greater expense thereby than would be the case in rural areas. We will never know what in fact moved the Legislature but we cannot say there is nothing in the local governmental legislation and management of a harness racing track adjacent to the metropolitan area, which is sufficiently different from running tracks elsewhere in the State, to warrant an authorization by the Legislature for the enactment of a different tax on admissions on these particular harness tracks.

Two other points should be mentioned as to both of which we agree with the Appellate Division. We hold that petitioner, being required by law to collect and pay over this tax, is a party aggrieved and so has standing to maintain this proceeding. We also agree with the court below that constitutionality may be tested out in an article 78 proceeding like this one (see CPLR 7803, subd. 2).

The order appealed from should be reversed, the petition dismissed and the County Comptroller's determination confirmed, with costs in this court and in the Appellate Division.

FULD, BURKE, BERGAN and KEATING, *JJ.*, concur with DESMOND, *C. J.*

VAN VOORHIS and SCILEPPI, *JJ.*, dissent and vote to affirm.

Order reversed, with costs in this court and in the Appellate Division, and matter remitted to the Comptroller of Nassau County for further proceedings in accordance with the opinion herein.

Opinion of the Appellate Division

MEMORANDUM BY THE COURT

Proceeding pursuant to article 78 of the Civil Practice Law and Rules: (1) to review a determination of respondent Comptroller of Nassau County, made December 30, 1964 after a hearing, assessing a deficiency against petitioner on account of county admission taxes; and (2) for judgment that chapter 837 of the Laws of 1956 and Nassau County Local Law No. 1 of 1956 are unconstitutional and void.

By order of the Supreme Court, Nassau County, entered June 21, 1965, the proceeding has been transferred to this court for disposition.

Determination annulled and petition granted, with costs.

By statutes enacted in 1952 and 1954 (L. 1952, chs. 148, 236; L. 1954, chs. 285, 287) a tax of 15% on all admissions to harness horse race meetings and running horse race meetings was authorized. Pursuant to this enabling act, Nassau County adopted local laws imposing a 15% tax on all admissions to harness horse race meetings in the county (Nassau County Local Laws, No. 1—1952, No. 1—1954).

By statute enacted in 1956 (L. 1956, ch. 837) it was provided that, in cities or counties adjacent to a city having a population in excess of two million, a local law enacted pursuant to the statute shall require a tax of 30% on the admission price to a harness horse race meeting held within the area to which the local law is applicable. In all other cities and counties, the tax was to remain at 15% of the admission price to harness horse race meetings. Nassau County thereupon adopted a local law imposing a 30% tax on admissions to harness horse race meetings within the county (Nassau County Local Law 1—1956).

By this proceeding, petitioner attacks the constitutionality of the 1956 enabling act and of the said local law enacted thereunder. We are of the opinion that (1) the

proceeding may be maintained to test the constitutionality of those acts, despite the fact that there is no dispute as to the amount of the unpaid taxes (cf. Van Antwerp v. State of New York, 218 N. Y. 422, 427, 113 N. E. 497, 498; Matter of Policemen's Benevolent Ass'n of Westchester County v. Board of Trustees of Vil. of Croton-on-Hudson, 21 A. D. 2d 693, 695, 250 N. Y. S. 2d 523, 527; CPLR 7803, subd. 2; Nassau County Administrative Code, § 4-2.4); (2) petitioner is a party aggrieved, with standing to maintain the proceeding, despite the fact that the admision tax is imposed on the patron, since petitioner must collect and pay over the tax and is personally liable for the amount thereof upon its failure to do so (cf. Socony-Vacuum Oil Co. v. City of New York, 247 App. Div. 163, 165, 287 N. Y. S. 288, 290, affd. 272 N. Y. 668, 5 N. E. 2d 385; International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U. S. 435, 440, 64 S. Ct. 1060, 88 L. Ed. 1373); (3) petitioner is not estopped from challenging the constitutionality of the enabling act, despite the fact that it availed itself of substantial benefits conferred by independent and separable provisions of the same statute (cf. Thompson v. Consolidated Gas Co., 300 U. S. 55, 80-81, 57 S. Ct. 364, 81 L. Ed. 510; United States v. Rappeport, D. C., 36 F. Supp. 915, 917, affd. sub. nom. United States v. Herling, 2 Cir., 120 F. 2d 236); (4) the local law, which by its terms became effective upon the approval of the enabling act by the Governor, was not invalid because it was signed three days before the enabling act was approved (cf. Barto v. Himrod, 8 N. Y. 483, 490); (5) if it be assumed that section 9 of Article I of the State Constitution prohibits the taxation of pari-mutuel betting by a county, the enabling act did not violate that provision as the permitted tax on admissions was not a tax on pari-mutuel betting; and (6) the enabling act was not a special or local law which required a request therefor by the Board of Supervisors or

a certificate of necessity by the Governor (cf. Robinson v. County of Broome, 276 App. Div. 69, 73, 93 N. Y. S. 2d 662, 665, affd. 301 N. Y. 524, 87 N. Y. S. 2d 501.)

In our opinion, the enabling act and the local law are unconstitutional and invalid Assuming that the Legislature may make distinctions for tax purposes having a rational basis (Ampco P-A Offset Corp. v. City of New York, 14 N. Y. 2d 11, 24, 247 N. Y. S. 2d 865, 871, 197 N. E. 2d 285, 289; appeal dismissed 379 U. S. 5, 85 S. Ct. 47, 13 L. Ed. 2d 21), there is no rational basis for a distinction between a tax on running tracks and one on harness tracks. They are both part of a single sport of horse racing. Both types of tracks have been granted financial benefits for the purpose of improvement of facilities so as to increase tax revenues. Under these circumstances, petitioner was denied the equal protection of the laws because the tax on admissions to harness horse race meetings was increased to 30%, while the tax on admissions to running horse race meetings remained at 15%.

BELDOCK, *P. J.*, and HILL, *J.*, concur.

BENJAMIN, *J.*, concurs in the annulment of the determination and granting of the petition, with the following memorandum: In my opinion, petitioner was denied the equal protection of the laws because the tax on admissions to harness horse race meetings in Nassau and Westchester Counties was increased to 30%, whereas the tax on harness horse race meetings in other counties of the State remained at 15%. In addition, it is my opinion that the statute, although general in form, was so limited with restrictions and conditions as to make it in effect a local law and thus was violative of the Home Rules provisions of the State Constitution, without a request therefor by the Board of Supervisors or a certificate of necessity by the Governor

(c.f. Matter of Henneberger, 155 N.Y. 420, 50 N.E. 61, 42 L.R.A. 132; Matter of Mayor, etc. of New York [Elm St.], 246 N.Y. 72, 158 N.E. 24).

BRENNAN and RABIN, *JJ.*, dissent and vote to confirm the determination and to deny the petition, with the following memorandum: We differ with the majority solely on the ground that, in our opinion, the enabling act and the local law are not unconstitutional and invalid. Petitioner was not denied the equal protection of the laws merely because the tax on admissions to harness horse race meetings was increased to 30% while the tax on admissions to running horse race meetings remained at 15%. In matters of taxation, the Legislature has broad powers of classification and, in our opinion, the distinction between the two types of race meetings was not arbitrary and without a reasonable basis (cf. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-529, 79 S.Ct. 437, 3 L.Ed.2d 480; Spatt v. City of New York, 14 A.D.2d 30, 31-32, 218 N.Y.S.2d 409, 410-411, affd. 13 N.Y.2d 618, 240 N.Y.S.2d 605, 191 N.E. 2d 91, appeal dismissed 375 U.S. 394, 84 S.Ct. 451, 11 L.Ed.2d 411). It may reasonably be conceived that the Legislature permitted higher taxes on admissions to harness horse race meetings because those tracks were given substantial benefits, under sections 1 and 2 of the enabling act, which were not afforded running race horse meetings. In our view, petitioner failed to sustain the burden of negativing "every conceivable basis which might support" the legislative classification (cf. Madden v. Com. of Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590).

BLANK

PAGE